A

HAP SENG PLANTATIONS (RIVER ESTATES) SDN BHD v. EXCESS INTERPOINT SDN BHD & ANOR

FEDERAL COURT, PUTRAJAYA
ZULKEFLI AHMAD MAKINUDIN CJ (MALAYA)
SURIYADI HALIM OMAR FCJ
B AHMAD MAAROP FCJ
HASAN LAH FCJ
ABU SAMAH NORDIN FCJ
[CIVIL APPEAL NO: 06-1-04-2014(S)]
7 APRIL 2016
C [2016] (JT6)

CONSTITUTIONAL LAW: *High Court – Jurisdiction – High Court of Malaya and High Court of Sabah and Sarawak – Jurisdiction to transfer case from one High Court to another – Whether High Court in Malaya could transfer proceedings before*
D *it to High Court in Sabah and Sarawak, and vice versa – Federal Constitution, art. 121 – Courts of Judicature Act 1964, ss. 23, 25(1) & (2), para 12 of Schedule thereto – Rules of Court 2012, O. 57 r. 1*

CIVIL PROCEDURE: *Transfer of proceedings – From one High Court to another – Jurisdiction –Whether High Court in Malaya could transfer proceedings before*
E *it to High Court in Sabah and Sarawak, and vice versa – Federal Constitution, art. 121 – Courts of Judicature Act 1964, ss. 23, 25(1) & (2), para 12 of Schedule thereto – Rules of Court 2012, O. 57 r. 1*

WORDS & PHRASES: *'Local jurisdiction' – Courts of Judicature Act 1964, s. 3*
F *– Local jurisdiction of High Court of Malaya and High Court of Sabah and Sarawak – Power to transfer proceedings from one High Court to another*

WORDS & PHRASES: *'Without prejudice' – Courts of Judicature Act 1964, s. 25(1) & (2) – Jurisdiction and powers of High Court – Whether denoting that additional powers of High Court as in Schedule to Act should not be inconsistent*
G *with art. 121 of Federal Constitution that there should be two separate High Courts with their own territorial jurisdiction*

This appeal raises the question of the jurisdiction of the High Court, specifically as to whether the High Court in the State of Malaya is empowered in law to transfer a case filed before it to a High Court in the State
H of Sabah and Sarawak. The facts as adduced showed that the appellant had filed a civil suit in the High Court at Kuala Lumpur against the respondents ('the KL suit'). The first respondent thereafter applied for the suit to be transferred to the High Court at Kota Kinabalu, whereupon an order was made by the judge transferring the KL suit to the Kota Kinabalu High Court
I ('the KK suit'). It was the view of the judge, in so transferring the KL suit, that upon a proper reading of para 12 of the Schedule to the Courts of Judicature Act 1964 ('CJA'), and O. 57 r. 1 of the Rules of Court 2012

('ROC 2012'), both the High Court of Malaya and the High Court of Sabah and Sarawak had the jurisdiction to hear the KL suit, but that, on the facts, it was Sabah, and not Malaya, which constituted the *forum conveniens* for the suit. Be that as it may, following an observation made by David Wong J (as he then was) during an interlocutory hearing in the KK suit as to the constitutionality of the transfer *vis-à-vis* art. 121 of the Federal Constitution ('FC'), the subsequent presiding judge, Chew Soo Ho J took the liberty to invoke s. 84 of the CJA and posed the following question of law for the determination of the apex court, namely: whether, in view *inter alia* of art. 121 of the FC, O. 57 r. 1 of the ROC 2012 and para 12 of the Schedule to the CJA, the High Court in Malaya had the power or jurisdiction to transfer proceedings to the High Court in Sabah and Sarawak, or *vice versa*.

Held (answering question in the negative; transmitting case to High Court, Kota Kinabalu for disposal of matter)
Per Zulkefli Ahmad Makinudin CJ (Malaya) delivering the judgment of the court:

(1) The power to transfer any proceeding to any other court as stated in para. 12 of the Schedule to the CJA must be read with s. 3 of the CJA where 'local jurisdiction' is defined to mean in the case of the High Court in Malaya, the territory comprised in the states of Malaya and in the case of Sabah and Sarawak, the territory comprising the states of Sabah and Sarawak respectively. It follows therefore that the power to transfer any proceeding must be confined to transfer within a particular local jurisdiction and not between the two local jurisdictions. (para 15)

(2) Bearing in mind the saving provisions 'Without prejudice to the generality of art. 121 of the Constitution', and 'Without prejudice to the generality of sub-s. (1) the High Court' in s. 25(1) and (2) respectively of the CJA, the defendants were right in contending that the provision of the CJA with respect to the additional powers as set out in the Schedule to the CJA could not have intended to compromise art. 121 of the FC. The wording 'without prejudice' denotes that the additional powers as set out in the said Schedule, namely para. 12 thereof, should not be inconsistent with art. 121's intention for there to be two separate High Courts with their own territorial jurisdiction. (para 16)

(3) Reading s. 3 on the definition of 'local jurisdiction' together with ss. 23(1) and 25(1) and (2) of the CJA, it would appear that the Legislature did not have the intention to override or circumvent art. 121 of the FC and the specific territorial jurisdiction granted to each High Court. It was not intended that there could be a transfer of proceedings between the two territorial jurisdictions. And, although O. 57 r. 1(4)(a) of ROC 2012 speaks of a transfer of proceedings from the High Court to another High Court of 'co-ordinate jurisdiction', the context must be

confined to the respective territorial jurisdiction of the two High Courts, namely that of Malaya on the one hand and Sabah and Sarawak on the other. (paras 18 & 19)

(4) There was no merit in the argument that O. 57 r. 1 of ROC 2012 purports to confer jurisdiction to transfer proceedings from one High Court in the State of Malaya to another High Court in Sabah and Sarawak or *vice versa*. It is important to note that the Federal Constitution allows the High Court to have jurisdiction only as conferred by federal law. The ROC 2012 is not a federal law and therefore cannot grant power to transfer proceedings between the two High Courts in the State of Malaya and the State of Sabah and Sarawak. (para 23)

(4a) It is also to be noted that although s. 25 of the CJA provides for additional powers to be granted to the High Court, the powers are explicitly stated to be exercised within its local jurisdiction. Likewise, bearing in mind the difference between 'power' and 'jurisdiction' (adverted to in *Lee Lee Cheng (f) v. Seow Peng Kwang* and *Abdul Ghaffar Mohd Amin v. Ibrahim Yusoff & Anor*), s. 25 of the CJA and para. 12 of the Schedule thereof only purport to confer powers and not jurisdiction to transfer proceedings from one court to another. It follows that O. 57 r. 1 of the ROC 2012 made pursuant to s. 17(1) of the CJA does not give the jurisdiction to transfer proceedings from the High Court of Malaya to the High Court of Sabah and Sarawak or *vice versa*. (paras 24 & 25)

Bahasa Malaysia *Headnotes*

Rayuan ini membangkitkan persoalan mengenai bidang kuasa Mahkamah Tinggi, khususnya mengenai sama ada Mahkamah Tinggi di Malaya di sisi undang-undang boleh memindahkan prosiding-prosiding di hadapannya ke Mahkamah Tinggi di Sabah dan Sarawak. Fakta sepertimana yang dikemukakan menunjukkan bahawa perayu telah memfailkan satu guaman sivil di Mahkamah Tinggi di Kuala Lumpur terhadap responden-responden ('guaman KL'). Responden pertama kemudian memohon supaya guaman tersebut dipindahkan ke Mahkamah Tinggi Kota Kinabalu, dan berikutnya satu perintah telah dikeluarkan hakim memindahkan kes tersebut ke Mahkamah Tinggi Kota Kinabalu ('guaman KK'). Adalah menjadi pandangan hakim, dalam memindahkan guaman KL tersebut, bahawa, bersandarkan pembacaan betul perenggan 12 Jadual Akta Mahkamah Kehakiman 1964 ('AMK'), dan A. 57 k. 1 Kaedah-Kaedah Mahkamah 2012 ('KKM 2012'), kedua-dua Mahkamah Tinggi Malaya dan Mahkamah Tinggi Sabah dan Sarawak mempunyai bidang kuasa untuk mendengar guaman KL, akan tetapi Sabah adalah *forum conveniens* bagi guaman tersebut dan bukannya negeri-negeri di Malaya. Apapun, ekoran pandangan yang dibuat oleh David Wong H (sepertimana beliau masa itu) dalam satu prosiding interlokutori

guaman KK tentang keperlembagaan pemindahan kes tersebut di sisi per. 121 Perlembagaan Persekutuan ('PP'), hakim berikutnya yang membicara kes, Chew Soo Ho H, telah mengguna pakai s. 84 AMK dan sekaligus mengemukakan persoalan undang-undang berikut untuk keputusan mahkamah tertinggi, iaitu: sama ada mengambil kira antara lain per. 121 PP, A. 57 k. 1 KKM 2012 serta perenggan 12 Jadual AMK, Mahkamah Tinggi Malaya mempunyai kuasa atau bidang kuasa untuk memindahkan prosiding di hadapannya ke Mahkamah Tinggi Sabah dan Sarawak, dan begitu juga sebaliknya.

Diputuskan (menjawab soalan secara negatif; mengembalikan kes ke Mahkamah Tinggi Kota Kinabalu untuk pelupusan hal perkara)
Oleh Zulkefli Makinudin HB (Malaya) menyampaikan penghakiman mahkamah:

(1) Kuasa untuk memindah prosiding ke mana-mana mahkamah seperti yang dinyatakan di perenggan 12 Jadual AMK hendaklah dibaca bersama s. 3 AMK di mana 'bidang kuasa tempatan' ditakrifkan sebagai bermaksud, bagi Mahkamah Tinggi Malaya wilayah yang termasuk di dalam negeri-negeri Tanah Melayu, dan bagi Mahkamah Tinggi Sabah dan Sarawak wilayah yang termasuk di dalam Negeri Sabah dan Sarawak masing-masingnya. Ianya mengikut bahawa kuasa untuk memindahkan mana-mana prosiding hendaklah dihadkan kepada pemindahan di dalam salah satu bidang kuasa tempatan tersebut dan bukannya di antara dua bidang kuasa berkenaan.

(2) Mengambil kira peruntukan pengecualian 'Tanpa menjejaskan keluasan per. 121 Perlembagaan' dan 'Tanpa menjejaskan keluasan sub-s. (1), Mahkamah Tinggi' masing-masing di s. 25(1) dan (2) AMK, defendan-defendan betul apabila menghujahkan bahawa peruntukan AMK berhubung kuasa-kuasa tambahan seperti yang dibentang di dalam Jadual AMK tidak bermaksud untuk mengkompromi per. 121 PP. Perkataan 'tanpa menjejaskan' menunjukkan bahawa kuasa-kuasa tambahan yang dibentang di situ, iaitu di perenggan 12nya, tidak sepatutnya tidak konsisten dengan tujuan per. 121 untuk membentuk dua Mahkamah Tinggi yang berasingan dengan masing-masing mempunyai bidang kuasa wilayahnya sendiri.

(3) Membaca s. 3 mengenai takrif 'bidang kuasa tempatan' bersama-sama dengan ss. 23(1) dan 25(1) dan (2) AMK, badan perundangan nampaknya tidak berniat untuk menyisih atau tidak mempedulikan fasal 121 PP serta bidang kuasa wilayah khusus yang diberikan kepada setiap Mahkamah Tinggi. Adalah tidak diniatkan bahawa pemindahan prosiding boleh dibuat di antara kedua-dua bidang kuasa wilayah tersebut. Dan, walaupun A. 57 k. 14(a) KKM 2012 bercakap mengenai pemindahan prosiding dari Mahkamah Tinggi ke Mahkamah Tinggi lain yang 'setara bidang kuasa', konteksnya hendaklah dihadkan kepada setiap satu bidang kuasa wilayah kedua Mahkamah Tinggi tersebut, iaitu Tanah Melayu di satu pihak dan Sabah dan Sarawak di pihak yang lain.

(4) Tidak ada merit pada hujah bahawa A. 57 k. 1 KKM 2012 berniat memberi bidang kuasa untuk memindahkan prosiding dari Mahkamah Tinggi di Tanah Melayu ke Mahkamah Tinggi di Sabah dan Sarawak atau sebaliknya. Adalah penting untuk menyedari bahawa Perlembagaan Persekutuan hanya membenarkan Mahkamah Tinggi memperoleh bidang kuasa setakat yang diberikan oleh undang-undang persekutuan kepadanya. KKM 2012 bukan merupakan undang-undang persekutuan dan kerana itu tidak boleh memberi kuasa untuk memindah prosiding antara kedua-dua Mahkamah Tinggi di negeri-negeri Tanah Melayu dan negeri-negeri Sabah dan Sarawak.

(4a) Perlu juga diperhati bahawa walaupun s. 25 AMK memperuntukkan bahawa kuasa-kuasa tambahan adalah diberi kepada Mahkamah Tinggi, ia dinyatakan dengan jelas bahawa kuasa-kuasa tersebut hendaklah dilaksanakan di dalam bidang kuasa tempatannya. Begitu juga, mengambil kira perbezaan antara 'kuasa' dan 'bidang kuasa' (dinyatakan dalam *Lee Lee Cheng (f) v. Seow Peng Kwang* and *Abdul Ghaffar Mohd Amin v. Ibrahim Yusoff & Anor*), s. 25 AMK dan perenggan 12 Jadualnya hanya bertujuan memberikan kuasa tetapi tidak mempunyai bidang kuasa untuk memindahkan prosiding dari satu mahkamah ke mahkamah yang lain. Ianya mengikut bahawa A. 57 k. 1 KKM 2012 yang digubal di bawah s. 17(1) AMK tidak memberi bidang kuasa untuk memindahkan prosiding dari Mahkamah Tinggi Malaya ke Mahkamah Tinggi Sabah dan Sarawak atau sebaliknya.

Case(s) referred to:

Abdul Ghaffar Md Amin v. Ibrahim Yusoff & Anor [2008] 5 CLJ 1 FC ***(refd)***

Asia Debut Sdn Bhd v. Kementerian Pendidikan Malaysia & Ors [2014] 1 LNS 1339 HC ***(refd)***

Badan Peguam Malaysia v. Kerajaan Malaysia [2009] 1 CLJ 833 FC ***(refd)***

Dayasar Corp Sdn Bhd v. CP Ng & Co Sdn Bhd [1990] 1 CLJ 262; [1990] 2 CLJ (Rep) 11 HC ***(refd)***

Fung Beng Tiat v. Marid Construction Co [1997] 2 CLJ 1 FC ***(refd)***

Lee Lee Cheng v. Seow Peng Kwang [1960] 1 MLJ 1 ***(refd)***

Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd [1987] 1 LNS 55 HC ***(refd)***

Syarikat Nip Kui Cheong Timber Contractor v. Safety Life And General Insurance Co Sdn Bhd [1975] 1 LNS 173 HC ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, s. 93(7)

Courts of Judicature Act 1964, ss. 3, 7(2), 17(1), 23(1), (2), 25(1), (2), 84, Schedule para 12

Federal Constitution, arts. 121(1), 160(2)

Rules of Court 2012, O. 57 r. 1(1), (4)(a)

For the appellant - Alex Decena (Marshalle Tan with him); M/s Jayasuriya Kah & Co

For the 1st respondent - Brenndon Keith Soh; M/s Ronny Cham & Co

For the 2nd respondent - Alvin Leong Yin Yuan (Wong Heu Fun with him); M/s Shelley Yap

Reported by Wan Sharif Ahmad

JUDGMENT

Zulkefli Ahmad Makinudin CJ (Malaya):

Parties

[1] The appellant is a company incorporated in Malaysia under the Companies Act 1965. It has a registered address at Level 21, Menara Hap Seng, Jalan P Ramlee, 50250 Kuala Lumpur, and a business address at Sungai Segama, Jalan Jeroco, Lahad Datu, 91100 Sabah.

[2] The first respondent is a company incorporated in Malaysia under the Companies Act 1965. It has a registered address at No. 37A, Lorong Bunga Matahari 1B, Taman Maju Jaya, 56100 Kuala Lumpur based on the record of the Companies Commission of Malaysia.

[3] The second respondent is an individual whose last known address is at Taman Mawar, Blok 74, Lot 577, PPM 153, Elopura, 90000 Sandakan, Sabah.

[4] The appellant was the plaintiff and the first respondent and the second respondent were the first defendant and the second defendant respectively before the High Court. We shall refer to the parties as they were before the High Court.

Proceedings In The High Court

[5] The plaintiff filed Civil Suit No. 22NCVC-631-05-2012 against the first defendant and second defendant on 23 May 2012 in the High Court of Malaya at Kuala Lumpur ("the KL suit"). The KL suit is an action based on fraud and forgery of company resolutions, and a power of attorney purportedly given to the second defendant in 1977 by the previous registered owner of a piece of land in Sabah, authorising him to sell the land and keep the proceeds for himself. The previous registered owner of the land was The River Estates Sendirian Berhad.

[6] In the KL suit, the plaintiff asked for, among others, a declaration that:

(i) the plaintiff is the lawful registered owner of the land held under CL 095310017, in the District of Kinabatangan, Sabah (land); and

(ii) the power of attorney by The River Estates Sendirian Berhad given to the second defendant authorising him, among others, to sell the land and receive all payments from the sale of the land is null and void.

[7] The plaintiff's case against the second defendant is that he had forged the resolutions and the power of attorney; and the first defendant knew about the fraud committed by the second defendant. The first defendant applied to transfer the KL suit to the High Court at Kota Kinabalu. After hearing submissions from the parties' counsel on 10 August 2012, the learned High Court Judge of Kuala Lumpur ruled as follows:

(a) Both the High Court of Malaya and the High Court of Sabah and Sarawak have jurisdiction to hear the KL suit;

(b) the *forum conveniens*, namely the appropriate court to try the KL suit, however, is in Sabah for the following reasons:

(i) the second defendant is a resident in Sabah;

(ii) the land in question is in Sabah;

(iii) another party, an individual, is also claiming beneficial ownership of the land relying on a substantial power of attorney given under the disputed power of attorney, and has filed an originating summons asking the court to declare, among others, that he is the beneficial owner of the land;

(iv) the witnesses who purportedly attested the disputed power of attorney and sale and purchase agreement are in Sabah;

(v) the Investigation Officer resides in Sabah;

(vi) the Registrar's caveat and private caveat had been entered at the Land Office in Sabah; and

(vii) one of the defendants' witnesses, Ms Rose Tio, resides in Sabah.

(c) The High Court of Malaya has power under para. 12 of the Schedule to Courts of Judicature Act 1964 to transfer the KL suit to the High Court of Sabah and Sarawak.

(d) Under the new Rules of Court 2012 ("ROC 2012") which came into force on 1 August 2012, the High Court can transfer a suit from one High Court to another High Court of co-ordinate jurisdiction under O. 57 r. 1 of the ROC 2012.

(e) The learned judge distinguished the Federal Court's decision in *Fung Beng Tiat v. Marid Construction Co* [1997] 2 CLJ 1.

[8] The KL suit has now been transferred and registered in the High Court Kota Kinabalu as BK1-22-209-9-2012 ("KK suit") pursuant to the order dated 10 August 2012 made by High Court of Malaya. During a hearing of an interlocutory application in the KK suit on 25 October 2012, His Lordship David Wong J (as he then was) observed that the transfer order granted on 10 August 2012 with respect to the KL suit by the High Court of Malaya, may be unconstitutional based on art. 121 of the Federal Constitution and the Federal Court's decision in *Fung Beng Tiat* (*supra*).

[9] On 14 June 2013, His Lordship Chew Soo Ho J of the High Court at Kota Kinabalu pursuant to s. 84 of the Courts of Judicature Act 1964 ("CJA") made an order dated 14 June 2013 to refer this issue on jurisdiction as a constitutional question to the Federal Court. The question of law posed before this court is as follows:

Whether, in view of Article 121 (1) of the Federal Constitution, Order 57 rule 1 of the Rules of Court 2012 and paragraph 12 of the Schedule to the Courts of Judicature Act 1964, the High Court of Malaya has the power or jurisdiction to transfer proceedings to the High Court of Sabah and Sarawak, or *vice versa*?

Submission Of The Plaintiff

[10] For the plaintiff it was submitted that under O. 57 r. 1 of the ROC 2012 there is now a provision allowing for the one High Court to transfer proceedings to the other. Therefore the High Court of Malaya in Kuala Lumpur has the power to order the transfer of the KL suit to the KK suit. Learned counsel for the plaintiff cited the case of *Asia Debut Sdn Bhd v. Kementerian Pendidikan Malaysia & Ors* [2014] 1 LNS 1339; [2015] 9 MLJ 770 as the authority for the proposition. In this case Mary Lim J amongst others held as follows:

With amendments to include Order 57 in the Rules of Court 2012, one High Court can now transfer proceedings to the other High Court where previously it could not. Before the new rules were introduced the High Court's power to transfer to another Court of co-ordinate jurisdiction was confined or restricted to another High Court within the local jurisdiction of the appropriate High Court which in this case would be to any of the High Court within West Malaysia. As the two High Courts of Malaya and High Court of Sabah and Sarawak are Courts of co-ordinate jurisdiction, one High Court could not at that time, transfer to another High Court. That was clearly held to be the case in *Fang Beng Tiat v. Marid Construction Co*. [1997] 2 CLJ 9.

Submission Of Defendants

[11] For the first and second defendants it was submitted that notwithstanding O. 57 r. 1 of the ROC 2012 and para. 12 of the Schedule to the CJA, it is not possible for the High Court of the two different territorial jurisdictions to transfer proceedings between each other for the following reasons:

(a) Article 121(1) of the Federal Constitution states there are two separate High Courts in Malaysia each of which exercises distinct territorial jurisdiction;

(b) There is no Federal legislation allowing for the one High Court in one territorial jurisdiction to transfer proceedings to the other of a separate territorial jurisdiction;

(c) The CJA defines the two separate High Courts and provides for two separate "local jurisdictions"; and

(d) Order 57 r. 1 of the ROC 2012 are procedural and do not provide the substantive law within which to empower the transfer of proceedings between the two High Courts which are of separate local jurisdictions.

Decision

[12] It is appropriate at the outset that we reproduce in full the relevant provisions of the law contained in the question of law posed before us. On the jurisdiction and status of the two High Courts of Malaya and of Sabah and Sarawak, art. 121(1) of the Federal Constitution states as follows:

> There shall be two High Courts of co-ordinate jurisdiction and status, namely:
>
> (a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry in Kuala Lumpur; and
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> (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;
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> and such inferior courts as may be provided by federal law and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

[13] On the transfer of proceedings between the courts, O. 57 r. 1(1) of the ROC 2012 states as follows:

> Where the Judge of the High Court or a Judge of the Sessions Court or a Magistrate is satisfied that any proceedings in that Court can be more conveniently or fairly tried in some other Court of co-ordinate jurisdiction, he may on application by any party, order the proceedings to be transferred to the other Court.

[14] On the exercise of jurisdiction and powers of the High Court s. 25(1) and (2) of the CJA states as follows:

> (1) Without prejudice to the generality of Article 121 of the Constitution the High Court shall in the exercise of its jurisdiction have all the powers which were vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction.
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> (2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:
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> Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.

Paragraph 12 of the Schedule to the CJA states:

> Power to transfer any proceedings to any other Court or to or from any subordinate court, and in the case of transfer to or from a subordinate court to give any directions as to the further conduct thereof:
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> Provided that this power shall be exercised in such manner as may be prescribed by any rules of court.

[15] We are of the considered view that the power to transfer any proceedings to any other court as stated in para. 12 of the Schedule of the CJA must be read in light of s. 3 of the CJA where "local jurisdiction" is defined to mean in the case of the High Court in Malaya, the territory comprised in the States of Malaya and in the case of the High Court in Sabah and Sarawak, the territory comprising of the States of Sabah and Sarawak respectively. (see the case of *Dayasar Corp Sdn Bhd v. CP Ng & Co Sdn Bhd* [1990] 1 CLJ 262; [1990] 2 CLJ (Rep) 11; [1990] 1 MLJ 191). It therefore follows that the power to transfer any proceedings must be confined to transfer within a particular local jurisdiction and not between the two local jurisdictions as it were. This would be consistent with the judicial pronouncement in *Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd* [1987] 1 LNS 55; [1988] 2 MLJ 268 wherein Lim Beng Choon J, *inter alia,* held as follows:

> a High Court located at Penang or at Alor Setar is but a branch of the High Court in Malaya and each branch of the High Court in Malaya located in any state has concurrent jurisdiction to entertain any civil proceedings regardless of whether the cause of action arose in another state.

[16] It is noted that s. 25(1) of the CJA has a saving provision to the effect that it states "Without prejudice to the generality of art. 121 of the Constitution ...". This is similarly reproduced in s. 25(2) of the CJA where it states "Without prejudice to the generality of sub-s. (1) the High Court...". We agree with the submission of learned counsel for the defendants that the provision in the CJA with respect to the additional powers as set out in the Schedule to the CJA must not have intended to compromise art. 121 of the Federal Constitution. It is clear that the wording "without prejudice" would denote that the additional powers as set out in the said Schedule, namely para. 12 should not be inconsistent with art. 121's intention for there to be two separate High Courts with their own territorial jurisdiction.

[17] It is also to be noted that if we were to look at s. 23(1) of the CJA in respect of "Civil Jurisdiction – general" it states:

> Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where:
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> (a) the cause of action arose;
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> (b) the defendant or one of several defendants resides or has his place of business;
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> (c) the facts on which the proceedings are based exist or are alleged to have occurred; or
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> (d) any land the ownership of which is disputed is situated,
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> **within the local jurisdiction of the Court** ... . (emphasis added)

[18] We are of the view reading s. 3 on the definition of "local jurisdiction" together with ss. 23(1) and 25(1) and (2) of the CJA, it would appear that the Legislature did not have the intention to override or circumvent art. 121 of the Federal Constitution and the specific territorial jurisdiction granted to each High Court. It was not intended that there could be a transfer of proceedings between the two territorial jurisdictions.

[19] Although O. 57 r. 1(4)(a) of the ROC 2012 speaks of a transfer of proceedings from the High Court to another High Court of "co-ordinate jurisdiction", we take the view that the context must be confined to the respective territorial jurisdiction of the two High Courts, namely that of Malaya on the one hand and Sabah and Sarawak on the other. It is clear that the High Courts within the States of Malaya are each of co-ordinate jurisdiction as are each of the High Courts in the States of Sabah and Sarawak.

[20] Useful reference can also be made to the provision of s. 7(2) of the CJA with regard to the process of courts which would further lend weight to the above interpretation as it states:

> All writs, summonses, warrants, orders, rules, notices, and other processes whatsoever, whether civil or criminal, issued or made by or by the authority of the Court respecting any cause or matter **within its jurisdiction** shall have full force and effect and may be served or executed anywhere within Malaysia. (emphasis added).

On this point we would refer to the case of *Syarikat Nip Kui Cheong Timber Contractor v. Safety Life And General Insurance Co Sdn Bhd* [1975] 1 LNS 173; [1975] 2 MLJ 115 wherein Hashim Yeop J had this to say:

> Counsel for the plaintiff seeks to rely on the purported interplay of the definitions of 'High Court' and 'local jurisdictions' and section 7(2) of the 1964 Act. Section 3 of the Courts of Judicature Act, 1964 defines 'High Court' to mean 'the High Court in Malaya and the High Court in Borneo or either of them, as the case may require'. The definition of 'local jurisdiction' sets out the territorial jurisdiction of the High Court in Malaya and the High Court in Borneo.
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> ...
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> It is all too clear that both the High Court in Malaya and the High Court in Borneo have separate and distinctive territorial jurisdiction. Article 121(1) of the Constitution speaks of the two High Courts having 'co-ordinate jurisdiction' and the definition of 'local jurisdiction' in the Courts of Judicature Act, 1964 speaks of the territorial jurisdiction of each of the two High Courts.
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> ...
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> The enactment of section 7(2) of the 1964 Act itself would strengthen the argument that the framers of the 1964 Act recognised the distinctive territorial jurisdiction of the two High Courts in Malaysia.

[21] The issue on the transfer of proceedings from one High Court in Malaya to the High Court in Sabah and Sarawak was dealt with by the Federal Court in the case of *Fung Beng Tiat v. Marid Construction Co* (*supra*). In that case, a creditor's petition was issued from the High Court at Kuala Lumpur. The judgment debtor was in fact ordinarily resident in Sandakan, Sabah. The judgment creditor argued that the proceedings could be transferred to Sandakan and relied on, *inter alia,* s. 93(7) of the Bankruptcy Act 1967 which reads:

> Where the debtor is proved to be resident in a State other than the State in which a petition under this Act is presented, the court may upon application duly made in that behalf order the transfer of the proceedings to the court of the State in which the debtor resides, at any time before or after the making of a receiving order against the debtor.

The Federal Court dismissed the contention of the judgment creditor holding at p. 419:

> First, it is crystal clear from Article 121 of the Federal Constitution that there are two separate High Courts in Malaysia exercising distinct territorial jurisdiction over different geographical areas of the country. There is the High Court in Malaya and there is the High Court in Sabah and Sarawak. Each has jurisdiction over disputes that arise within its territory.

[22] The Federal Court in *Fung Beng Tiat* also stated immediately after the above quoted passage that, "As presently advised, there is absent in any Federal legislation that confers power upon the one High Court to transfer proceedings to the other." It is noted that O. 57 r. 1 of the ROC 2012 was made by the Rules Committee after the case of *Fung Beng Tiat* was decided. Learned counsel for the plaintiff had contended relying on the decision of Mary Lim J in the case of *Asia Debut Sdn. Bhd. v. Kementerian Pendidikan Malaysia & Ors* (*supra*) O. 57 r. 1 of the ROC 2012 may be interpreted as purporting to confer jurisdiction to transfer proceedings from one High Court in the State of Malaya to another High Court in Sabah and Sarawak or *vice versa*. With respect we could not agree with such a contention.

[23] It is important to note that the Federal Constitution allows the High Courts to have jurisdiction only as conferred by Federal law. The ROC 2012 is not a Federal law as it does not fall within the definition of a Federal law pursuant to art. 160(2) of the Federal Constitution. The ROC 2012 is not an Act of Parliament and therefore it is our view that O. 57 r. 1 of the ROC 2012 cannot grant power to transfer proceedings between the two High Courts in the State of Malaya and the State of Sabah and Sarawak. On the definition of "Federal law" in the case of *Badan Peguam Malaysia v. Kerajaan Malaysia* [2009] 1 CLJ 833; [2009] 2 MLJ 161 Gopal Sri Ram JCA (as he then was) stated:

> Put shortly, federal law means any pre-Merdeka law and any Act of Parliament. You will notice that the definition is not open-ended. It is fixed. It says 'federal law means'. It follows that it is not open for a court

A to include any other written law within the definition. So, rules of Court made under the Courts of Judicature Act are, by constitutional definition not federal law.

[24] We noted that s. 25 of the CJA provides for additional powers to be granted to the High Court, and these powers are explicitly stated to be B exercised within its local jurisdiction. Jurisdiction therefore is still a limiting factor to these powers. As regards the difference between "power" and "jurisdiction", it would be useful to refer to the decision of Thomson CJ in *Lee Lee Cheng v. Seow Peng Kwang* [1960] 1 MLJ 1 at p. 3 wherein it is stated as follows:

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> It is axiomatic that when different words are used in a statute they refer to different things and this is particularly so where the different words are, as here, used repeatedly. This leads to the view that in the Ordinance there is a distinction between the jurisdiction of a Court and its powers, and this suggests that the word "jurisdiction" is used to denote the types of subject matter which the Court may deal with and in relation to which D it may exercise its powers. *It cannot exercise its powers in matters over which, by reason of their nature or by reason of extra-territoriality, it has no jurisdiction. On the other hand in dealing with matters over which it has jurisdiction, it cannot exceed its powers.* (emphasis added)

[25] The above passage in *Lee Lee Cheng* was cited with approval by the E Federal Court in *Abdul Ghaffar Md Amin v. Ibrahim Yusoff & Anor* [2008] 5 CLJ 1; [2008] 3 MLJ 771. Observations were made in that case in relation to the Rules of the Federal Court 1995 which would be relevant to the argument in the present case as to whether O. 57 r. 1 of the ROC 2012 grants jurisdiction to transfer a case from the High Court of Malaya to the High F Court of Sabah and Sarawak. On this issue it is our considered view that s. 25 of the CJA and para. 12 of the Schedule to the CJA only purport to confer powers and not jurisdiction to transfer proceedings from one court to another. It therefore follows that O. 57 r. 1 of the ROC 2012 made pursuant to s. 17(1) of the CJA does not give the jurisdiction to transfer proceedings G from the High Court of Malaya to the High Court of Sabah and Sarawak or *vice versa*.

Conclusion

[26] For the reasons abovestated we would answer the question posed before us in the negative. We herein make an order that this case be sent back H to the High Court at Kota Kinabalu for the disposal of the matter by the said High Court. We make no order as to costs of these proceedings.

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